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U.S. Citizenship and Immigration Services

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[redacted]

MAR 02 2004

FILE: EAC 01 227 54100 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer systems sales and maintenance firm. It seeks to employ the beneficiary permanently as a programmer analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's priority date. The director also found that the petitioner had not established that it had the financial ability to pay the proffered wage as of the filing date of the petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is October 2, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of programmer analyst required a Bachelor of Science degree in Computer Science, Mathematics, or Engineering.

The director determined that the petitioner had not established that the beneficiary had the required Bachelor's degree and denied the petition.

On appeal, counsel states that the facts of this case are similar to an unpublished CIS (formerly INS) decision. It should be noted that while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The record contains evidence that the beneficiary passed the Bachelor of Science degree (Three Year Integrated Degree Course) Examination in the Pass Class with the subjects of Chemistry and Botany in May 1995. The record further contains an educational evaluation from Baruch College, which states that the beneficiary has the equivalent of three years toward a bachelor's degree offered by an accredited university in the United States.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position; CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec.

401, 406 (Comm. 1986). *See also Madany v. Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey,* 661 F.2d 1 (1st Cir. 1981).

The issue here is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary has a Bachelor of Science degree in computer science, mathematics, or engineering on October 2, 2000. Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has established his ability to pay the proffered wage as of the priority date of the petition.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of the ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is October 2, 2000. The beneficiary's salary as stated on the labor certification is $35.54 per hour (37.5 hours) or $69,303.00 per annum.

Counsel submitted a copy of the beneficiary's W-2 Wage and Tax Statement which showed he was paid $44,426.92 in 2000, and copies of the petitioner's 1999 and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The tax return for 1999 reflected gross receipts of $876,483; gross profit of $874,822; compensation of officers of $242,774; salaries and wages paid of $321,422; and an ordinary income (loss) from trade or business activities of $9,472.

The tax return for 2000 reflected gross receipts of $727,005; gross profit of $726,871; compensation of officers of $187,475; salaries and wages paid of $316,583; and an ordinary income (loss) from trade or business activities of -$994.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the beneficiary's W-2 Wage and Tax Statement which shows he was paid $56,339.04 in 2001 and argues that:

> The year 2001 entailed a dramatic change in the direction and operation of Automatic Information Systems. Business conditions were such that we sharply lowered our overhead by moving to smaller less expensive offices and continuing with our most productive staff. With this structure and our loyal client base we are well able to meet all payroll and related tax requirements of [the beneficiary].

The petitioner's Form 1120S for calendar year 2000 shows an ordinary income of -$994. The petitioner could not pay a proffered wage of $69,303 a year out of the income.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.